No. 95-341

Supreme Court, U.S.
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In The
Supreme Court of the United States
October Term, 1995

JEAN F. TRIGALET, et al,
Petitioner,

vs.

M. WARRICK, et al,
Respondents.

On Petition For a Writ of Certiorari
To The United States Court of Appeals
For the Tenth Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Was the Tenth Circuit correct in granting the Respondents, individual police officers, qualified immunity?

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BRIEF IN OPPOSITION

Respondents, Officers M. Warrick, H. Stege, and D. Pierce, respectfully request that the Petition for Writ of Certiorari be denied.

OPINIONS BELOW

This case was brought in the Northern District of Oklahoma pursuant to 42 U.S.C. §1983. On March 30, 1993, the trial court granted summary judgment to all defendants. The order of the trial court was that the Respondents were entitled to qualified immunity. On November 23, 1993, the trial court vacated a portion of its previous order, denied the individual officers qualified immunity, and reinstated the lawsuit as to the Respondents. The Respondents appealed the reversal to the Tenth Circuit Court of Appeals.

The Tenth Circuit overturned the trial court's decision by opinion dated May 2, 1995. The Tenth Circuit's opinion is reproduced in the Appendix to Petitioner's Petition for Writ of Certiorari.

STATEMENT OF THE CASE

Two vehicles were observed by police officers, including defendant M. Warrick, traveling through a residential neighborhood under circumstances warranting a police field inquiry of both drivers at 12:05 a.m. Sunday, May 5, 1990. Officers of the Tulsa Police Department attempted to stop both vehicles. One vehicle was successfully stopped. (Appt. App. at 136-137). The second vehicle, identified as an "Astro van, tag number ICW-176," refused to stop and was pursued by a Tulsa officer. Police dispatchers immediately identified the vehicle to the officers as a stolen vehicle. (Appt. App. at 32).

The pursuit lasted approximately 2 minutes, 19 seconds, before the pursuing officer lost contact with the

vehicle on 2nd Street at Evanston Avenue. (Appt. App. at 32, 35-37). During the pursuit defendant Stege was monitoring its progress. Stege drove his car east from 3rd and Lewis Avenue toward the area where the original officer lost sight of the stolen vehicle, a distance of approximately one mile. (Appt. App. at 34-35, 53-55).

About thirty seconds after Officer Warrick lost sight of the stolen vehicle Officer Stege observed it run the stop sign at the intersection of 2nd Street and Delaware Avenue and turn south. The vehicle was being driven recklessly and at a high rate of speed. At the time Stege first spotted the vehicle he was at 3rd and Delaware, one block south. At that time Stege activated his emergency equipment, lights and siren. The driver turned west on 3rd Street. Stege then started his pursuit of the vehicle. (Appt. App. at 34-36, 46, 48-49, 56).

The second pursuit covered a distance of less than one and one half miles and lasted approximately fifty-two seconds. (Appt. App. at 32-33). The pursuit went through two major intersections guarded by traffic signal lights. Both the driver of the stolen vehicle and Stege drove through those intersections while the lights were green. (Appt. App. at 38-39, 50, 63). The speed of the stolen vehicle was estimated to be 60-80 m.p.h. The driver of the stolen vehicle did not slow for the intersections. Officer Stege did. (Appt. App. at 38-39, 42-44, 47-51, 57, 59, 62-65).

Stege was three blocks behind the stolen vehicle when its driver ran the red light at 3rd Street and Peoria Avenue and collided with the vehicle occupied by the decedents. The decedents' vehicle had been traveling south in the outside lane of Peoria. (Appt. App. at 44-45, 52, 57-58, 63). Stege had observed the light at that

intersection turn from green to red a few seconds before the driver of the stolen vehicle entered the intersection and strike the other vehicle. (Appt. App. 43-44, 52, 66-67).

REASONS FOR DENYING THE WRIT

The Petitioner fails to satisfy the criteria traditionally applied by the Court in determining whether to grant a writ of certiorari. A review of the authorities reveals the decision of the Tenth Circuit is in accord with the decisions of this Court and other Circuit Courts of Appeal.

THE LAW REGARDING LIABILITY OF A POLICE OFFICER FOR INJURY CAUSED BY A THIRD-PARTY DURING A HIGH SPEED PURSUIT WAS NOT CLEARLY ESTABLISHED ON MAY 6, 1990.

1. ELEMENTS OF QUALIFIED IMMUNITY

The test for qualified immunity is whether government officials, performing discretionary acts, violated "clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982). In *Anderson v. Creighton*, 483 U.S. 635, 638-640, 107 S. Ct. 3034, 3039, 97 L.Ed.2d 523 (1987) this Court held that the "contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." The Court added the proviso that "(t)his is not to say that an

official's action is protected unless the very action in question has previously been held unlawful . . . but it is to say that in light of preexisting law the unlawfulness must be apparent." Once the issue of qualified immunity is raised the opposing party has the burden of showing the officers violated clearly established law. *Davis v. Scherer*, 468 U.S. 183, 104 S.Ct. 3012, 3021, 82 L.Ed.2d 139 (1984).

2. POLICE LIABILITY FOR INJURIES CAUSED BY A SUSPECT

Historically, the courts have applied the guarantee of due process provided by the Fourteenth Amendment to "*deliberate* decisions of government officials to deprive a person of life, liberty, or property. *Daniels v. Williams*, 474 U.S. 327, 106 S. Ct. 662, 88 L.Ed.2d 662, 668 (1996). The Court in *Daniels* did not decide "whether something less than intentional conduct, such as recklessness or 'gross negligence,' is enough to trigger the protections of the Due Process Clause." *Daniels*, 474 U.S. at 334.

In *Archuleta v. McShan*, 897 F.2d 495, 498 at nt. 6 (10th Cir. 1990) the Tenth Circuit held that "If, during the course of an arrest or other police action, the police direct action against a person who previously had bystander status with the requisite deliberateness to do injury to that person, his status would at that point change from one of a bystander to a direct object of state action. At that point, a due process claim could arise on behalf of such a person." The Tenth Circuit decided *Archuleta* two months before the acts leading to this case.

The Tenth Circuit dealt with the directedness issue again in *Medina v. City and County of Denver*, 960 F.2d

1493, 1406 (1992). There, the Tenth Circuit held a police officer involved in a pursuit violates a third-party's Fourteenth Amendment due process rights when the officer acts with "reckless indifference to the risk created and directs his actions toward the bystander." *Medina*, 960 F.2d at 1406. "An act is reckless when it reflects a wanton or obdurate disregard or complete indifference to the risk" created. *Medina*, 960 F.2d at 1496. The directedness component is met if "(1) the plaintiff is a member of a limited and specifically definable group, (2) the defendant's conduct specifically put members of that group at a substantial risk of serious, immediate, and proximate harm, (3) the risk was obvious or known, and (4) the defendant acted recklessly in conscious disregard of that known risk." *Medina*, 960 F.2d at 1496. The Tenth Circuit decided *Medina* two years after the acts leading to the present case occurred.

As stated above, the Tenth Circuit had concluded that recklessness could lead to a claim under 42 U.S. §1983 before the acts leading to this case. What the Tenth Circuit had not decided before May 6, 1990, was whether an officer "could be liable under section 1983 for an injury caused not by the officer but by a suspect being chased by the officer." *Medina*, 960 F.2d 1498. In the case now before the Court, the Tenth Circuit determined the second issue was not clear until its decision in *Medina*. See Appendix to Petition For A Writ Of Certiorari, at App. 7.

It is unnecessary for the Court to address the first question presented by the Petitioner. That question involves the issue of whether recklessness and deliberately indifferent conduct, in the context of police pursuits, give rise to a claim under 42 U.S.C. §1983. Although other circuits that have adopted the "shocks the conscience"

standard in pursuit cases, the Tenth Circuit has adopted a reckless indifference standard the Tenth Circuit found it unnecessary to address the issue. *Webber v. Mefford*, 43 F.3d 1340, nt. 3 (10th Cir. 1994). The Tenth Circuit held in this case that "Although we recognize that the very conduct need not have previously been held unlawful, the Trigalets have cited no case, nor have we found one, that is sufficiently analogous top the facts here to persuade us that the law became clearly established before *Medina* was decided in 1992." Appendix to Petitioner's Petition For Writ of Certiorari at App. 7-8.

CONCLUSION

Further review of this case is not warranted. Accordingly, for the foregoing reasons, the petition for certiorari should be denied.

Respectfully submitted,

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